# STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

**THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350**

**Internet Address: http://www.dps.state.ny.us**

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October 2, 2002

Hon. Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals II
445 Twelfth Street, SW
Washington, DC 20554

RE: Comments of the New York State Department of Public Service in the Matter of the Petition of MCI Metro Access Transmission Services, LLC for Preemption of the Jurisdiction of the New York Public Service Commission Pursuant to §252(e)(5) of the Communications Act; WC Docket No. 02-283.

Dear Secretary Dortch:

On September 17, 2002, the Federal Communications Commission (FCC) released a Public Notice seeking comments on MCI Metro's Petition that the FCC preempt the New York Public Service Commission's (New York's or NYPSC's) §252(e)(5) jurisdiction over an interconnection agreement. The Petition arises from New York's decision to refrain from immersing itself in an MCI and Verizon dispute over the reciprocal compensation provisions of their interconnection agreement.

The NYPSC chose not to review the interconnection dispute because it involved contract interpretation questions turning on the FCC's use of the term "reciprocal compensation."[1] While NYPSC has no objection to the FCC attempting to resolve this contract dispute, we would take issue with a holding that New York had a statutory §252 duty to determine Verizon's and MCI's contractual intent regarding the term "reciprocal compensation."

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[1] In February 1999, the FCC held that Internet-bound calls to ISPs are interstate, In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 14 FCC Rcd. 3689 (1999), which was subsequently vacated. In April 2001, the FCC issued a remand order holding again that Internet-bound calls are interstate. The D.C. Circuit Court again remanded to the FCC, but did not vacate the FCC's April 2001 Order.

There is no statutory language in §252 that obligates states to interpret contract disputes under the Act. In fact, in providing that federal district courts may review state commission decisions "to determine whether the agreement or statement meets the requirements of section 251 and this section," §252(e)(6) implicitly limits state commission "responsibilities" to deciding whether interconnection agreements, ab initio, comply with §251. Congress, therefore, did not obligate states to adjudicate ongoing contract disputes throughout the terms of interconnection agreements. If Congress had done so, then – unless one assumes that being accused of shirking a statutory duty is not comparable to being subjected to monetary liability – §252 would have run afoul of the 10th Amendment and the Guarantee Clause. New York v. United States, 505 U.S. 144 (1992).

Several courts have held that state PUCs may interpret interconnection agreements, but such authority does not translate into a statutory duty. Thus, rather than review MCI's claim under §252(e)(5), which authorizes FCC preemption of state responsibilities, the Commission should exercise its §208 authority, alluded to in Matter of Starpower Communications Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission, (fn 16), to resolve the Verizon/MCI contract dispute.

Very truly yours,

Lawrence G. Malone
General Counsel
Public Service Commission of
the State of New York
Three Empire State Plaza
Albany, New York 12223-1359
(518) 474-2510